

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DOUGLAS KESSLER,
Plaintiff,

v.

**PENNSYLVANIA DEPARTMENT
OF CORRECTIONS, et al.,**
Defendants.

C.A. No. 19-275 Erie

**District Judge Susan Paradise Baxter
Magistrate Judge Richard A. Lanzillo**

MEMORANDUM ORDER

Plaintiff Douglas Kessler, an inmate incarcerated at the State Correctional Institution at Forest in Marienville, Pennsylvania (“SCI-Forest”), initiated this *pro se* civil rights action in the Court of Common Pleas of Forest County, Pennsylvania, against Defendants Pennsylvania Department of Corrections and SCI-Forest’s Superintendent, Mr. Oberlander. On September 23, 2019, Defendants properly removed the case to this Court, and this matter was referred to United States Magistrate Judge Richard A. Lanzillo for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. The case was subsequently reassigned to the undersigned, as presiding judge, on November 6, 2019, with Judge Lanzillo remaining as the referred Magistrate Judge for all pretrial proceedings.

In his *pro se* complaint, Plaintiff alleges that Defendants’ policy banning the sale of tobacco products and penalizing an inmate’s possession of tobacco violates his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to equal protection. On November 5, 2019, Defendants filed a motion to dismiss [ECF No.

10], arguing that Plaintiff's complaint fails to state a claim upon which relief can be granted.

On April 16, 2020, Magistrate Judge Lanzillo issued a report and recommendation ("R&R") recommending that Defendant's motion to dismiss be granted, and that Plaintiff's constitutional claims based on the general banning of tobacco in prisons should be dismissed without leave to amend. [ECF No. 17]. However, Judge Lanzillo added that "Plaintiff should be permitted an opportunity to file an amended complaint alleging deliberate indifference to a serious medical need, if factually warranted. Such a claim must be properly exhausted and should typically be directed at the specific individuals who failed to provide necessary medical treatment." The time for filing objections to the R&R expired on May 4, 2020, and no objections have been received from Plaintiff.

Thus, after de novo review of the complaint, Defendants' motion to dismiss, and Plaintiff's opposition thereto, together with the report and recommendation filed in this case, the following order is entered:

AND NOW, this 12th day of May, 2020;

IT IS HEREBY ORDERED that Defendant's motion to dismiss [ECF No. 10] is GRANTED, and Plaintiff's constitutional claims based on the general banning of tobacco in prisons are DISMISSED, with prejudice. Nonetheless, Plaintiff is granted the opportunity to file an amended complaint alleging deliberate indifference to a serious medical need, to the extent that such claim is properly exhausted, factually supported, and directed at the specific individuals who allegedly failed to provide necessary medical treatment. Such amendment shall be filed within thirty (30) days of the date of this Order. If Plaintiff fails to file an amended complaint within such time, this case will be dismissed in its entirety, with prejudice. The report and

recommendation of Magistrate Judge Lanzillo, issued April 16, 2020 [ECF No. 17], is adopted as the opinion of the Court.


SUSAN PARADISE BAXTER
United States District Judge

cc: The Honorable Richard A. Lanzillo
United States Magistrate Judge